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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/812,470	03/29/2004	Harald Albrecht	104035.275606	3150

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EXAMINER

GOLLAMUDI, SHARMILA S

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 09/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/812,470	Applicant(s) ALBRECHT ET AL.	
	Examiner Sharmila S. Gollamudi	Art Unit 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Claims 1-14 are pending in this application.

Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Information Disclosure Statement

The information disclosure statement (IDS) submitted on 3/29/04 has been considered by the examiner.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 13 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 13 is directed to a pump foamer that is protected from water splashes. The metes and bounds of this claim are vague and indefinite since it is unclear if applicant is attempting to claim a structural limitation to the container itself that provides this "protection". For instance, the pump may be protected from water splashes during use by placing the container in an area away from water splashing after dispensing the product. This interpretation would not limit the product claim since it is a method of using the product. The prior art will be applied using both interpretations.

Claim Rejections - 35 USC § 102

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The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 11, 13-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Sakurai et al (5,716,626).

Sakurai discloses a skin cleanser composition comprising (A) at least one anionic surfactant having a branched hydrocarbon group selected from phosphate surfactants, sulfate surfactants and sulfonate surfactants and (B) at least one nonionic surfactant, packed in a foamer container 10 provided with a porous membrane. See abstract. Component (A) is used in an amount of 1-30%, preferably in an amount of 1-10% and component (b) in an amount of 0.5-30% wherein the total amount of from 3 to 30% by weight. See column 4, lines 49-55 and column 7, lines 40-46. The foamer container may be pump foamer provided with a pumping unit with a cap which is to be pushed with fingers as described in JP-A-U-3-7963 and JP-A-U-62-103458. See column 9, lines 25-35. Sakurai discloses the additional use of bactericides, humectants, emollients, and dyes in the composition. See column 8, lines 45-65. Note examples for method of use.

With regard to claim 13, note the 112 indefinite rejection. Further, it is the examiner's position that the cap on the pump unit would protect the pump unit from water splashes.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-3, 7-8, 11, 13-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Hayward et al (6,537,952).

Hayward discloses a foaming cleansing product is in a non-aerosol pump dispenser. The dispenser includes a container for holding a liquid composition, a dispensing head with a housing enclosing a pump mechanism and a screen material in the flow path to convert liquid composition into foam. The cleansing composition comprises an anionic surfactant, and at least one surfactant selected from a nonionic and an amphoteric surfactant, a cationic polymer, and a hydrophobic antibacterial agent, and contains less than 0.05 wt. % of a water insoluble emollient; said composition being dispensed by the pump dispenser to provide a foam. The total amount of surfactants in the inventive composition does not exceed 12 wt. %, and preferably does not exceed 10.5 wt. %. See abstract. Specifically the composition comprises nonionic surfactants in an amount of 0.5-5% and preferably 2-3%. See column 3, lines 55-58. The composition further includes preservatives in an amount of 0.01-2% and fragrances and colorants in an amount of 0.05-5%. See column 4, lines 44-62. Table 1 utilizes decyl glucoside. The foam container exemplified in example 2 is Airspray international Co disclosed in WO 97/13585, which is equipped with a cap. See column 6, line 6. Note the examples for the method of using the composition to cleanse the skin.

With regard to claim 13, note the 112 indefinite rejection. Further, it is the examiner's position that the fastening cap on the pump unit would protect the pump unit from water splashes.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hayward et al (6,537,952) or Sakurai et al (5,716,626) respectively.

The teachings of both Hayward and Sakurai have been set forth above. Hayward teaches the total amount of surfactants in the inventive composition does not exceed 12 wt. %, and preferably does not exceed 10.5 wt. %. The weight ratio of the anionic surfactant to the nonionic and amphoteric surfactant is in the range of 0.2 to 1 to 3:1. See claim 3. Sakurai teaches the anionic surfactant is in an amount of 1-30%, preferably in an amount of 1-10% and nonionic surfactant in an amount of 0.5-30% wherein the total amount of from 3 to 30% by weight.

The instant ratios are not specified.

However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to look to the guidance of Hayward or Sakurai respectively and manipulate the concentration of the anionic surfactant to nonionic surfactant. One would have been motivated to do so since both references provide a general range of each surfactant. For instance, Sakurai teaches the anionic surfactant may be in an amount of 1-10% and the nonionic surfactant in an amount of 0.5-30%. Thus, instant ratio of 2:5 or 5:3 to 3.5:4 would be obvious since Sakurai's general ranges encompass the instant specific range. Similarly Hayward teaches the nonionic surfactant in an amount of 0.5-5% and the anionic surfactants utilized in various

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amounts ranging from 2.43% to 5.6%. Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

Claims 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hayward et al (6,537,952) in view of McAtee et al (6,280,757).

The teachings of Hayward have been set forth above. Hayward teaches various anionic surfactant including alkyl sulfonates, alkylether sulfonates, etc.

However, Hayward does not specify the instant anionic surfactant.

McAtee teaches cleansing articles for skin and hair. Teaches the use of various suitable lathering anionic surfactants including alkyl sulfonates, alkylether sulfonates, and glutamates such as sodium cocoyl glutamate. See column 17 and column 18, lines 20-21 and 38.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Hayward et al and McAtee et al and substitute Hayward's lathering anionic surfactant for the instantly claimed anionic surfactant. One would have been motivated to do so since McAtee teaches that the instantly claimed anionic surfactant and the anionic surfactants taught in Hayward are functionally equivalent in that they function as lathering anionic surfactants. Therefore a skilled artisan would have been motivated to substitute one functionally equivalent agent with another functionally equivalent agent with a reasonable

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expectation of success and similar results since the prior art establishes that alkyl sulfonates, alkylether sulfonates, glutamate surfactants all function in an equivalent manner.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hayward et al (6,537,952) in view of Charlton (6,224,886)

The teachings of Hayward have been set forth above. Hayward teaches the use of ethoxylated glycerides as foam densifiers. See column 4, lines 63-66.

However, Hayward does not specify the instant ethoxylated glycerides.

Charlton teaches a skin cleanser composition comprising surfactants. The reference teaches the use of thickeners including polyethylene glycol fatty acids such as PEG-200 hydrogenated glyceryl palmitate, PEG 150 distearate, and PEG 200 glyceryl tallowate.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Hayward et al and Charlton et al and utilize the instantly claimed ethoxylated glycerides. One would have been motivated to do so since Charlton teaches the instant ethoxylated glycerides acts as a thickener in skin cleansing composition. Thus, a skilled would have been motivated to utilize instant ethoxylated glycerides for its thickening function and one would have reasonable expectation of success Hayward teaches it is suitable to utilize ethoxylated glycerides.

Claims 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakurai et al (5,716,626) in view of McAttee et al (6,280,757).

The teachings of Sakurai have been set forth above. Sakurai teaches the additional use of other anionic surfactants including acylated amino acid salts. See column 8, line 12.

However, Sakurai does not specify the instant anionic surfactant.

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McAtee teaches cleansing articles for skin and hair. Teaches the use of various suitable lathering anionic surfactants including alkyl sulfonates, alkylether sulfonates, and glutamates such as sodium cocoyl glutamate. See column 17 and column 18, lines 20-21 and 38.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Sakurai et al and McAtee et al and further utilize the instantly claimed anionic surfactant. One would have been motivated to further add acyl glutamate with the expectation of success since McAtee teaches that the instantly claimed anionic surfactant is an effective lathering anionic surfactants in skin cleansing compositions and Sakurai teaches the suitability of acylated amino acid salts as additional anionic surfactants. Therefore a skilled artisan would have been motivated to substitute one functionally equivalent agent with another functionally equivalent agent with a reasonable expectation of success and similar results since the prior art establishes that alkyl sulfonates, alkylether sulfonates, glutamate surfactants all function in an equivalent manner.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned

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with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-11 and 14 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 10/534970. Although the conflicting claims are not identical, they are not patentably distinct from each other because:

The instant application is directed to a cosmetic cleaning product and a method of cleaning the hair comprising: a foamable, aqueous cleaning preparation comprising one or more nonionic surfactants and one or more anionic surfactants, and a pump foamer comprising a storage container and a pump mechanism in the form of a closure and having a riser tube for foaming the cleaning preparation present in the storage container.

Copending application '970 is directed to a cosmetic composition comprising at least two surfactants from the group consisting of sodium lauryl sarcosinate, sodium monoalkyl phosphate, disodium lauryl sulfosuccinate, disodium cocyl glutamate, alpha-olefin sulfonate, and lauryl glucoside with a total surfactant amount of 3-15%. Claim 4 is directed to the composition further comprising a preservative. Claim 6 is directed to a composition stored in a container with a pump foamer or an aerosol can. Claim 7 is directed to a method of applying the composition to the skin.

The difference between the instant application and copending application is that the instant application is directed to a product wherein the cosmetic is contained in a pump foamer container. However, copending '970 claims storing the composition in a pump foamer container in a dependent claim; thus rendering similar subject matter. Also the instant application is

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directed to a combination of at least one anionic surfactant and at least one nonionic surfactant.

Copending '970 claims a composition that contains at least two of sodium lauryl sarcosinate, sodium monoalkyl phosphate, disodium lauryl sulfosuccinate, disodium cocyl glutamate, alpha-olefin sulfonate, and lauryl glucoside. The surfactants claimed in US '970 are both anionic and nonionic surfactants. US '970 can contain more than two surfactants from the group and one can envisage the use of all of the surfactants; thus, rendering a similar scope. Note that the instant claim language does not preclude the additional components claimed in '970. The instantly claimed ratios are considered to be obvious to one of ordinary skill in the art.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

All the claims are rejected at this time.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila S. Gollamudi whose telephone number is 571-272-0614. The examiner can normally be reached on M-F (8:00-5:30), alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Sharmila S. Gollamudi
Examiner
Art Unit 1616